A Green Tier
for
Greater Environmental Protection

George E. Meyer
Secretary, Wisconsin Dept. of Natural Resources

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It is time for public policy makers to unleash America's potential to solve its remaining and emerging environmental problems. Respected studies make compelling cases for new approaches to advance beyond entry level regulatory policies that, even if fully enforced, fail to address 21st Century ecological challenges.

Comparatively few individuals have used these studies to test new ideas. Fear of criticism in an uncivil, uncompromising and unforgiving public square deters good people in government, business and the public interest community from questioning and improving upon the status quo.

Nevertheless, our national and ecological interests require courageous individuals in all sectors to boldly create a new ecological performance opportunity system to complement the old, minimalist environmental control structure.

The foundation and motivation for moving forward exists in our culture, law and history and can give courage to reformers, especially in the states:

- Culturally, America's founding values give citizens the right to improve their standing and earn the rewards of that improvement;
- Legally, the Constitution balances power between the federal level and states;
- Historically, a heralded principle of American governance holds that the states are the laboratories of democracy.

My hypothesis is that the states are where America must and will begin to create the next generation of environmental policies because they are capable of granting the freedom, protection and civility needed for the germination and nurturing of environmental change in these litigious times. For my hypothesis to be tested, however, the EPA needs clear direction and the states require statutory recognition to optimize the opportunity to experiment with minimal risk of backsliding. With Congressional direction, and adequate infrastructure, the states can create a learning system, with useful knowledge applied outward to each other and upward to Washington, their co-implementation partner.

Evidence supporting this hypothesis is found in the history of my own State of Wisconsin. As the 20th Century began, our collective civic purpose produced Progressive ideals and polices that influenced many local, state and federal public policies. The graduated income tax, professionalized civil service and workers' compensation programs have their origin in Wisconsin.

As the 20th Century ends, Wisconsin is recognized for two bold, new ventures in public policy: welfare reform and school choice. Gov. Tommy G. Thompson's welfare reform is replicated worldwide. Milwaukee is a laboratory for school choice, a program that was authorized under Gov. Thompson, a Republican, and is being implemented with the support of Mayor John Norquist, a Democrat. The Governor and Mayor share the New Progressive pragmatism that attacks complacency and rewards initiative. (1)

In that spirit of Progressive innovation, Wisconsin has begun to develop, test and share a new regulatory concept that allows qualified businesses and others to participate in a two-tier environmental performance system. (2)

Wisconsin's Cooperative Agreement Law

In 1997, Wisconsin's experiment began with an environmental innovation law contained in Gov. Thompson's biennial budget. The law created an environmental cooperation pilot program designed to "evaluate innovative environmental regulatory methods" to achieve greater environmental performance "both with respect to the effects that are regulated...and (those) that are unregulated."

On March, 25, 1999 Wisconsin Lt. Gov. Scott McCallum and Acting Region V Administrator David Ullrich approved the content of the Environmental Cooperation Pilot Program in

the first signed, comprehensive innovation agreement under the EPA-Environmental Council of States (ECOS) memorandum of understanding.

The agreement negotiation process was watched as a bellwether by ECOS states and now is seen as nationally significant by EPA's Office of Reinvention which has shared it with EPA regions. The agreement assures Wisconsin businesses that EPA will not subject them to undue scrutiny for taking part in the experiment, addressing a concern they expressed. Now the businesses are contacting the Department of Natural Resources (DNR) to negotiate pilot project contracts. The contracts are designed to produce greater environmental performance, allow regulatory relief and "seek to increase trust among government, facility owners and operators and the public."

The 10 projects are a step on Wisconsin's path toward a two-tiered system of "regulatory choice." Presently, the regulated entity has no choice; it must participate in the bottom tier, which we call the Control Tier. Even in the two-tiered system, the Control Tier will not change much, remaining comparatively inflexible, inhospitable and costly in terms of its transaction and administrative costs.

The second tier is called the Green Tier and is highly flexible in how statutorily set environmental standards may be met. It has greater delegated responsibility with accountability. Participation in the Green Tier is gained the old fashion way; it is earned.

The public policy vision of the two-tier system has all qualified businesses moving from the Control Tier to the Green Tier, although in compliance businesses may opt to live a perfectly legitimate, respectable and long existence in the Control Tier. Businesses in the Control Tier get more effective regulatory attention from the government and as such, Wisconsin's pilot projects now are paving the way for a system that represents a "less is more" performance paradox:

More control by the regulator produces greater results for many (but not all) firms in the Control Tier; less control from the regulator produces greater results for most firms in the Green Tier.

Changes in 30 Years

Environmental performance is the goal of both tiers as, indeed, it was when the Control Tier was created 30 years ago. However, conditions that gave birth to the Control Tier and those that exist today at the Green Tier's birth are considerably different. The difference is sufficient to inhibit the ability of the Control Tier system to make sufficient progress toward a sustainable, environmental goal. As stated by Debra S. Knopman and Emily Fleschner of the Progressive Policy Institute, it would be "sheer coincidence if the First Generation of national environmental laws and regulations conceived 30 years ago fit our needs at the start of the 21st Century." (3)

Knopman and Fleschner recall that the post-World War II American economy was heavily industrialized and most of its people lived in cities. At the time, emissions came from obviously polluting stationary and point sources that directly affected urban populations. These were industrial and other major sources of pollution that needed to be controlled. The laws worked; the most visible pollution was attacked and public health and the environment benefitted.

Even as water and air quality improved, however, it became obvious that some of the techniques and technologies used for the cleanup had flaws. One memorable old phrase used by regulators was "the solution to pollution is dilution". Many regulators and environmentalists today dismiss that phrase, but the truth is that discharge permits issued by regulators still use this principle. Similarly, regulators generally failed to appreciate the value of pollution prevention, closed loop manufacturing, sustainability, environmental management systems and industrial ecology. These tools are more common to Second Generation of environmental management thinking and still are not fully embraced by and sometimes resisted by traditional regulators.

In 30 years, technology has transformed industrial pollution control from a mechanical process to a technological one, often involving microbes or microchips. Rigid regulatory policies may be unresponsive to these techno-

logical improvements. Moreover, the global marketplace is prompting industry to drive out waste for business reasons. As a result, most industries targeted in the early environmental laws consider legal compliance as a business necessity. Nevertheless, virtually all of government's regulatory infrastructure remains focused on these entities that, for the most part, obey environmental laws. This raises questions about whether public dollars are being spent where they will do the most good, both in terms of oversight of less responsible permit holders and attention to the problems associated with unregulated pollution.

Recent court cases also raise questions as to whether both regulators and environmentalists can expect the same results or return on effort they've had in the past in promulgating rules and filing lawsuits. On May 14, 1999, in affirmation of a trend toward reassertion of legislative power over agencies, a federal appeals court ruled that EPA exceeded its authority in promulgating air quality rules to protect children's health but, as important, sent a message to Congress that it has the non-delegable Constitutional responsibility to provide much of the regulatory specificity heretofore developed by regulators.

The second major trend is seen in a series of "profound setbacks" for environmentalists suing alleged polluters under the citizen suit provisions of federal law. With increasing frequency, courts have rejected environmentalists' allegations and, as importantly, denied attorney fees for those bringing the suits. Coupled with the regulatory gridlock that has virtually shut down the enactment of new environmental legislation, these legal events challenge all parties to find alternative ways to protect the environment. (4)

Emphasizing that there must be vigorous pursuit of emission violations, legitimate questions can be raised about enforcement strategies that produce more paperwork violations and minor non-compliance infractions than tagging of real emission violations. Problems of inconsistency in regional definitions and enforcement policies also plague the system.

There are efforts to improve the system's efficiency and in some instances EPA and states have electronic reporting. However, states sometimes have been unsuccessful in securing EPA permission to modernize compliance reporting because of EPA's fear that a "paper trail" wouldn't be there for enforcement. The source of this attitude is the distrust in our suspicion-driven system and we pay an environmental price for that distrust in reduced scrutiny of entities that need it, wasted attention on those who don't need it and diverted attention from unregulated and unsolved environmental problems.

The Challenge of Unregulated Problems

The problems of achieving greater integration of environmental programs and addressing unregulated environmental problems such as non-point source pollution have concerned the United States for some time. However, the focus of the regulatory system has remained on the regulated problems in specific, regulated media categories. Change has been slow, prompting outside evaluations like that from the Organization for Economic Cooperation and Development (OECD) that said the U.S. was at the point of diminishing returns in its point source pollution regulatory expenditures.

One group placing the issue in context is the Multi-State Working Group on Environmental Management Systems (MSWG). (5)

In December, 1997, MSWG evaluated the proportional relationship between regulated and unregulated problems to understand what work was getting inadequate attention. MSWG created a pie chart to explain how thinking like a regulator instead of an environmentalist affects problem-solving. (Fig. 1)

MSWG's circle represents all "environmental aspects", a term from ISO 14001's management system goal-setting process. The "aspects" may include a variety of environmental problems and opportunities that are required to be identified and addressed in prioritized goals and targets before being registered as meeting ISO 14001 standards. These "aspects" may range from a regulated air or water emission,

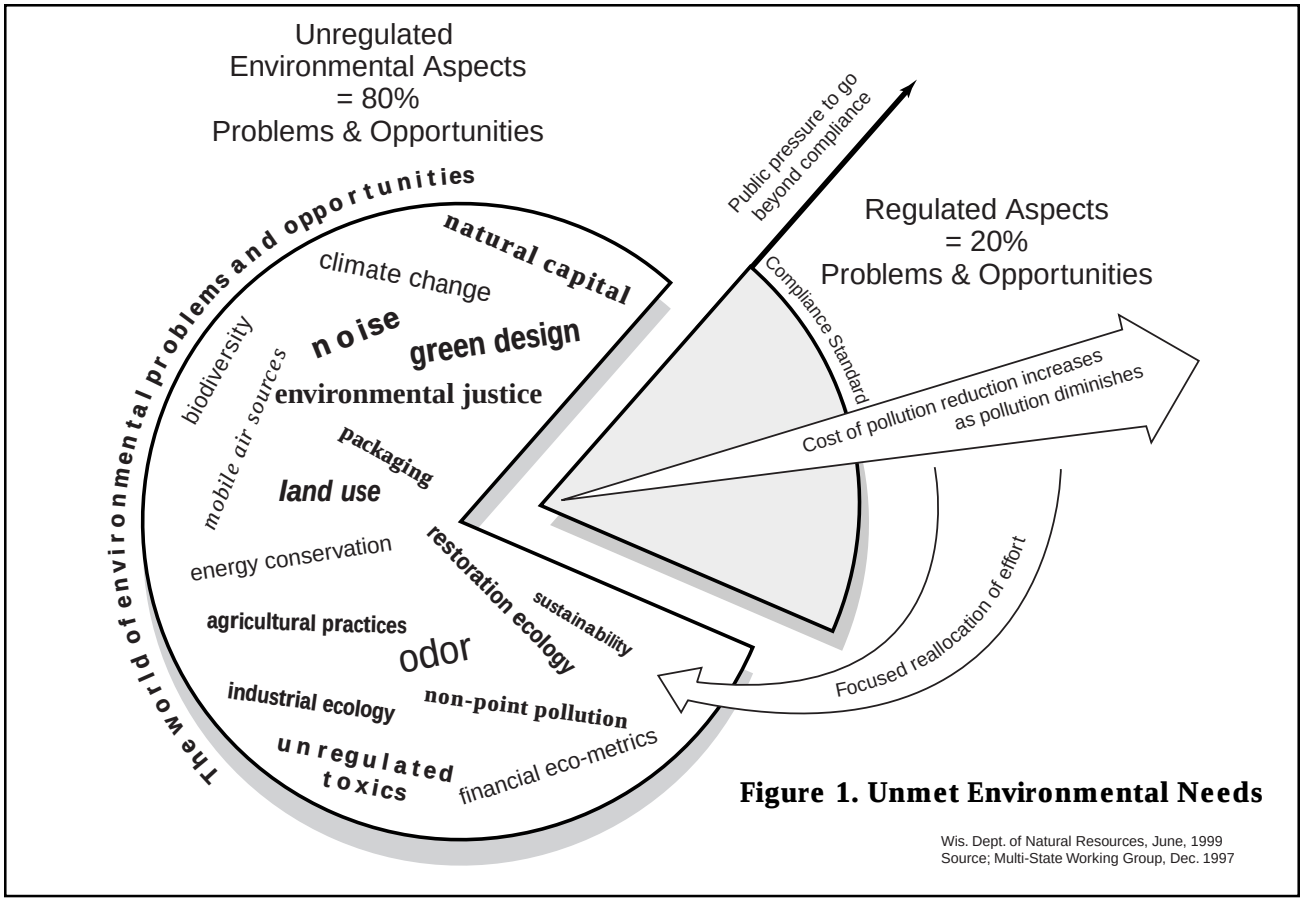


Figure 1. Unmet Environmental Needs

Wis. Dept. of Natural Resources, June, 1999
Source; Multi-State Working Group, Dec. 1997

to unregulated pesticide application, green product design or energy use.

MSWG contends that perhaps 20% of all environmental aspects are regulated (a figure that some in Europe challenged, alleging it was only 10%). These aspects such as air and water emissions demand nearly 100% of the regulator's time, even though compliance issues may have more to do with paperwork than actual emissions.

Since compliance limits are the legally allowed minimum to protect health, welfare and the environment, MSWG acknowledged there is legitimate pressure to go beyond compliance. But it may not always make sense for several reasons:

1. There may be greater risks from unregulated pollutants that may be addressed voluntarily by the regulated entity;
2. There may be other unattended environmentally-related problems or opportunities such as those relating to sustainability, biodiversity, or product stewardship;
3. There may be an unacceptably high ratio of pollution control dollar spent vs. control achieved, raising a comparative value choice;
4. There may be greater benefits to be leveraged by voluntarily working with others in the business sector, supply chain or community.

Inviting comparisons of relative regulatory value is troublesome to some regulators and regulated interests. The law's certitude protects them from the consequence of making judgment calls and negative criticism inevitable in any choice. If regulators and regulated simply do the minimum required, the risk of criticism is less. So MSWG's "Chicago pizza pie" illustrates a version of a risky choice for the regulated entity and regulator as to how they will allocate time, energy and money between regulated and unregulated environmental priorities.

Many of the environmental problems and opportunities MSWG listed on its pie chart were not obvious to the First Generation

environmental law drafters, but are obvious and even compelling today. They include: integrated ecosystem management, biodiversity, urban sprawl, farmland preservation, environmental justice, area source air emissions from small engines, mobile source air emissions from transport, industrial ecology, integrated pest management, product stewardship, acid rain, heavy metals, energy conservation, renewable and non-renewable energy mix, green facility design, fleet management, mercury emissions, sustainable development, new urbanism, non-point source water pollution, noise, light pollution, restoration ecology, packaging, climate change, endangered species protection, genetically manipulated organisms.

Knopman and Fleschner persuasively write about several of these issues, including non-point pollution which the EPA says affects 70% of rivers and streams that are failing to meet water quality standards. Another example documents that three fifths of smog-causing nitrogen oxides come from cars, trucks, railroads, airplanes and other non-industrial sources that are difficult to control under the Clean Air Act.

Why the Status Quo Endures

If there is a need to address unfinished environmental work, why is there so little agreement on the next steps? Logic prompts us to find better ways to accomplish things in our daily lives, whether it's finding a better commuting route or home remodeling. So it is difficult to explain why efforts to improve upon the environmental status quo are so few and, when attempted, have fallen so short. Even promising concepts such as the National Environmental Performance Partnership (NEPPS) have failed to win strong support.

As is the case in other aspects of modern society, a lack of trust is the root cause of much of the inertia. Indeed, distrust is at the foundation of the regulatory system and the system perpetuates that distrust which perpetuates the inertia.

Some see the distrust as pervasive, clouding the horizon of the possible with the fear of the improbable. It influences personal interactions between government and business. It pits non-government organizations against business and government. For regulators, distrust is especially dangerous because it fosters an inbreeding and introspectiveness that may produce an inability to distinguish the "what and the why" from the "how and the who" of environmental protection.

The simple explanation is that the regulator is singularly focused on protecting the environment. That is the "what". The public employee also is a passionate environmentalist, the "why".

The "how" is the law and the "who" is the regulatory expert. Thus, distrust isolates the regulator and fosters the regulator's impression that only she or he is qualified or authorized to protect the environment and the only effective tool is the stick. In truth, it is everyone's job to project the environment and everyone can contribute and use numerous tools, not just regulations. Failure to fully grasp this truth can explain some regulators' protection of the status quo and, not coincidentally, give continued purpose to the lobbyists hired to monitor the regulator.

Breaking the Political Deadlock

There are small signs the deadlock may be easing. A bi-partisan Congressional coalition and several states are developing new public policies from the principle that environmental performance should be encouraged. The concept of a performance-driven alternative to the Control Tier is emerging under different experimental labels in states like Wisconsin, Florida, Oregon, New Jersey, Colorado and Illinois.

The states, typically, are doing things differently. Oregon has three regulatory tiers. Florida has a performance based system. New Jersey is consolidating permits. Illinois has a state Project X-L.

The Congressional version is coming from Rep. Jim Greenwood (R-PA) and Rep. Cal Dooley (D-CA) and their colleagues on the Republican Main Street Partnership and New Democratic Coalition. The House draft bill represents the first significant break from last generation environmental policies with a chance of passage.

Title I directs the EPA to identify and remain focused on national environmental priorities that are managed through a performance indicator system using input from the National Academy of Sciences. In addition to focusing and modernizing its information management system, Congress asks EPA to stop collecting information of little value.

Title II directs the EPA to solicit and seriously consider proposals on new ways to protect the environment. The states and others would be protected in their experiments to find better and cheaper ways of accomplishing what's covered by the law, but also attack unregulated problems such as nonpoint source pollution.

The legislation is not talking about backsliding on either the general commitment of Congress to environmental protection or specific, legal environmental standards. It is in line with the majority of reinvention, innovation and experimentation initiatives that seek to do a better job of protecting the environment by using more logical, systematic and integrated approaches than those in existing regulations, policies, guidance and programs.

In explaining the proposal, David Goldston, legislative director for Rep. Sherwood Boehlert (R-NY), told a Midwest gathering that Congress needed to tell EPA that experimentation was both permitted and encouraged by law. He said that EPA's efforts to date, while laudable, were constrained in that the agency had to engage in legal contortions to allow reinvention initiatives such as Project X-L.

The Congressional coalition correctly concludes that EPA needs more clarity and direction in regard to innovation and performance systems. That direction must come soon and it should use the experiences of Wisconsin and other states that have, along with EPA, struggled to find a framework for innovation within a regulatory system that is innovation-adverse.

Wisconsin's Three Steps into the Future

The interest of Congress in helping states break new ground is well timed for Wisconsin and consistent with a prediction of the National Academy of Public Administration. In "Resolving the Paradox of Environmental Protection", Jonathan Howes, DeWitt John and Rick Minard predict that the "next big breakthrough is likely to be a series of small breakthroughs." (6)

They also could have said that one breakthrough leads to another as is happening in Wisconsin which is on a three step path to reform.

Wisconsin's first step was the 1997 Cooperative Environmental Agreement law. (7) The second step was the 1999 innovation agreement with EPA that allowed the law's implementation. (8) The third step is a voluntary Green Tier Performance System to complement the Control Tier. The Green Tier has not been enacted or even formally introduced. (9) It is out for discussion with the expectation that informed debate in keeping with Wisconsin's good government tradition will produce a credible and implementable product for us and replicable product for other states and the nation.

The attributes of the Green Tier system (Fig. 2) are several:

- Earned entry: Entry to the Green Tier by regulated entities is earned by accomplishments recorded in the Control Tier. Participation is assured if acceptable levels of performance are maintained, although Green Tier parties may voluntarily return to the Control Tier or be directed to return for performance failures.
- Performance contracts: Green Tier participants are regulated by performance contracts that meet the negotiated needs of the parties.
- Legal accountability: Contacts are enforceable as contracts with remedies, may be sanctioned by a court through an "environmental performance decree" or may merit "due diligence" designation through a credible environmental management system. Sanctions for performance failure are a part of the contract but don't necessarily reflect the sanctions for failure in the Control Tier.
- Environmental management system (EMS): Green Tier contracts require a credible environmental management system that

produces results and communicates progress to the public. The EMSs promote continuous performance improvement and build trust.

- Incentives: Incentives encourage Green Tier entities to achieve greater but not currently legally required environmental performance or use their capacity to leverage performance of others through mentoring, assistance, etc. Compliance with existing statutory environmental standards is a floor from which the participants move up.

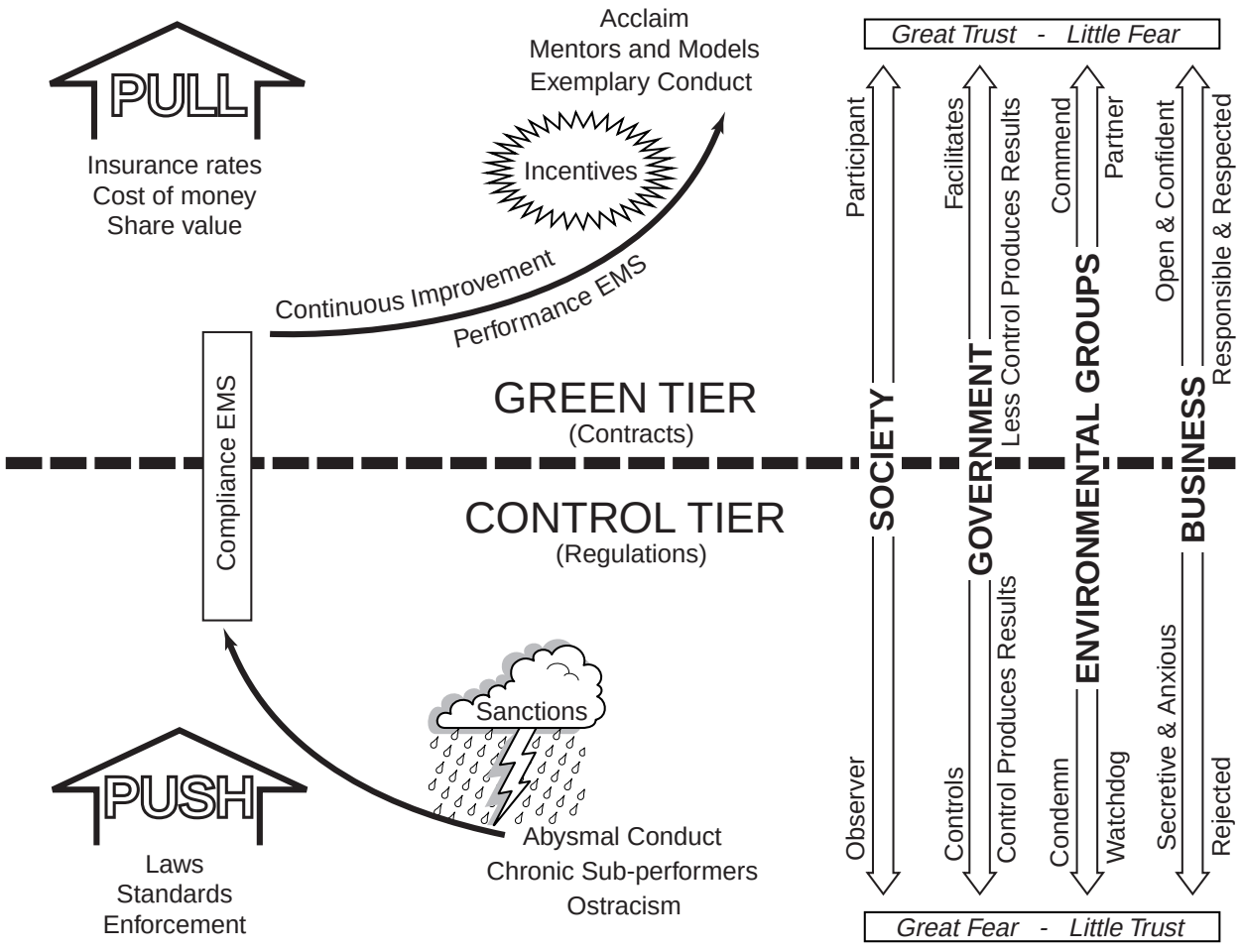
Earned Entry: Green Tier Participation Requirements

Debate should occur regarding the criteria and process by which a regulated organization can move from the Control Tier to Green Tier. Clearly, criteria will need to be established and enforced if the two-tier approach is to be fair and credible. It also is clear that government has not been particularly successful at establishing performance metrics in the past; so businesses, citizens and professionals must help government figure it out.

Nevertheless, the dialogue has to begin and it makes sense to focus on the promise of a new system. Part of the experiment should evaluate how different states respond in their recognition of compliance, beyond compliance, attention to unregulated aspects, public service and industry standing in setting "threshold" levels for multi-tier participation. The state of Oregon, for example, is fairly specific in the requirements that must be met in moving among its three regulatory tiers. (10)

In reality, it is unlikely there will be a precise formula that covers all cases for movement

Figure 2. How the Green Tier Works



Wis. Dept. of Natural Resources, June, 1999

into the Wisconsin Green Tier. The answer that may be most appropriate is: "It depends" and thus, policy makers will need to consider a transparent decision process, with appeal, to provide the opportunity for input and protection of the business or party seeking entry into or continued permission to stay in the Green Tier. (11)

It may be that the decision-makers are hesitant to make a firm decision on Green Tier entry. If there is apprehension about the organization's participation in the Green Tier, that apprehension may be expressed in the performance contract that might be provisional or probationary in nature. That means precise targets and performance mileposts, the monitoring and reporting requirements and in the sanctions for failing to meet targets. The performance contract should adapt to a firm's entry into the Green Tier just as it should adapt to the firm's exemplary performance once established in the Green Tier.

The Compliance EMS as an Entry Tool

Another aspect of Wisconsin's two-tier concept is a process for "bootstrapping" a sub-performer from the Control Tier to Green Tier. This opportunity most often applies in non-compliance and enforcement situations and is being tested through the Wisconsin pilot project law. The original proposal, similar to EPA's Project X-L, envisioned only allowing nearly perfect firms to participate. But Wisconsin environmentalists suggested providing an opportunity to test the contract-EMS approach with sub-performers and the law and the agreement with EPA provides for that possibility.

Once an organization is in the Green Tier, it is expected that the performance contract, aided by the Performance EMS, will promote improvement, especially when incentives for continued improvement in both regulated and unregulated aspects are applied as a "pull" agent. This positive "pull" force is complemented by a less enjoyable "push" force from the Control Tier's bottom. The push is from regulations, regulatory enforcement, the costs of compliance, the sense of being "watched" and the most powerful force of all, according to Prof. Larry Susskind of MIT: the force exerted by peers who consider you a laggard.

The application of a Compliance Environmental Management System (C-EMS) with court oversight, reporting to the public and sanctions for significant failure is gaining attention among state regulators and within the EPA's office of Enforcement and Compliance Assurance. (12)

Under the Green Tier approach, a C-EMS would be offered to the firm facing a non-compliance penalty but with the understanding that the enforcement settlement involving the EMS would be justified in exacting a high penalty if the C-EMS proved to be a penalty avoidance tactic.

Example: Green Tier Contract for a Compliance EMS:

A facility is accused of repeated air violations that have caused discomfort in the community but are not serious violations. The regulator, community representatives and facility agree to an enforcement settlement that is reflected in a performance contract that has a C-EMS with a stepped path to compliance through investments in equipment, personnel training and systems and increased reporting on progress toward commitments. After a series of in-compliance reports, the penalties may be reduced. The facility, now in the Green Tier, is put on a Performance-EMS (P-EMS), with compliance with emission standards as the P-EMS foundation.

As the sub-performing firm will discover, the path from out of compliance to exemplary conduct can produce more than tangible results in performance and regulatory relief. It is possible for the firm to be seen differently within the community and even by the employees. The regulated entity moves from a position of little trust to great trust and great fear (of the public and regulator) to little fear. This movement is an important transformation of how the regulated entity performs because it frees the capacity of that entity to produce greater reductions in pollution, give more attention to unregulated environmental problems and offer enhanced

service to society by helping others take on their environmental responsibilities.

One of regulatory advantages the firm will find in the Green Tier is that many of the oversight tools used by regulators as an expression of their distrust of the firm are now on the table. The negotiating framework authorized in the EPA-Wisconsin agreement that allows all non-standards related aspects of rules, policies and guidance to be discussed as flexible in the performance agreements and should be reflected in the Green Tier contracts. Such generous flexibility should not be granted to firms in the Control Tier.

Organizations remaining in the Control Tier, generally speaking, would not be any better or worse off due to the presence of the Green Tier. The Green Tier has been described as a new store, inviting new customers through the door. It is expected that the majority of the "customers" would remain in the old, Control Tier, store.

One outcome of the Green Tier's presence, over time, would be the freeing of regulators' time to give more attention to Control Tier inhabitants. Inhabitants falling into the category of chronic sub-performers could receive increased regulatory oversight.

Green Tier Performance Contracts

Signatories to the Green Tier contracts could be any party with a need or consideration to offer. That includes the regulated entity, an unregulated entity, the government regulator, a government agency other than the regulator, not-for-profit organizations or public advocacy groups to name a few. Emphasizing this is an evolving concept, here are hypothetical sketches of how performance contracts might be applied:

Example: Green Tier Contract for a farm:

A large animal agriculture facility that is subject to a wastewater permit negotiates a contract with regulators and the community that addresses regulated surface water discharges and any otherwise unregulated groundwater protection from nutrients, noise, odor, dust, hours of activity and aesthetic landscaping. In return, the farmer gets the "right to farm" as a condition within Green Tier contract limits as affirmed by the non-farm neighbors and regulators. The protection is especially important to the farmer given the U.S. Supreme Court's striking down of an Iowa right-to-farm law that is similar to Wisconsin's law.

Example: Green Tier Contract for air pollutants:

A consortium of businesses, utilities and other large stationary source air emitters in a non-attainment area form a legal coalition and contract with a regulator to achieve emissions reduction goals (through sub-contracts and other means) from stationary, mobile and area sources within the non-attainment area. They achieve and have validated through a third party, the reductions that they have achieved through market transactions, transport practice changes and aggressive pollution prevention and energy efficiency technical assistance. The reductions are sufficient to meet standards and provide for growth.

Example: Green Tier Contract for auto manufacturer and suppliers:

An automotive manufacturer has strong supplier relationships and business EMS that reaches into its supply chain. The Green Tier contract puts a "bubble" over the suppliers to allow production flexibility and regulatory streamlining in return for green product design considerations, purchasing from a minority-owned brownfield recovery area supplier, supply chain mentoring and energy conservation achievements that help the energy grid cope with demand. The automotive firm gets consideration from utilities and, through regulatory relief and agile manufacturing practices, reduces supply chain costs. (13)

Example: Green Tier Contract for a printing mentor:

A world class printing company provides training, mentoring, technical assistance, green procurement and regulatory support services such as report management to a cluster of small and medium sized printers, using their trade association as an administrative intermediary. The Green Tier contract with the regula-

tor and trade association addresses toxic material substitution, pollution prevention, recycled product content, waste exchange and energy conservation. The mentor gets regulatory relief, tax credits for training and technical assistance and fees from the small businesses. The small businesses achieve compliance, greater efficiency and reduced liability. The regulator keeps jurisdiction over two medium sized firms in the trade association that are in chronic non-compliance, administering a court-ordered Compliance-EMS that, if satisfactorily implemented, will permit the subperformers to enter the Green Tier, too.

Example: Green Tier Contract for a watershed:

A legally-chartered cooperative assumes contractual responsibility and authority to achieve water quality goals in a subwatershed's receiving water. The regulator uses a water quality standard (a Total Maximum Daily Loading outcome goal) to assign a non-point source pollution loading quota (an output goal) to the cooperative. Under contract, the co-op must meet the goal on time, using market, technical assistance and legal tools such as contracts. The cooperative has an agricultural base and therefore is concerned about regulations on its producer members. It now becomes the "deputized" agent of the state to bring its members into contract compliance and, coincidentally, provides environmental services as part of a product mix that previously was environmentally unfriendly.

Example: Green Tier Contract for food processing integration:

A food processor is subject to three management systems or requirements affecting the environment (ISO 14001), workplace safety (OSHA) and product integrity (HACCP). Administering the systems is costly and redundant. The facility's Green Tier contract with environmental, workplace and food regulators saves regulatory costs, improves efficiency and provides its marketing department a labeling opportunity to distinguish its product with wholesalers, retailers or consumers. Regulators find common performance metrics that can be used as environmental and safety indicators in that and other bioscience operations. They also discover, and resolve through the EMS, a food safety problem inadvertently caused by a conflicting environmental regulation.

Example: Green Tier Contract for a complex brownfield:

Principal responsible parties to a major cleanup initiative enter into a Green Tier contract as a part of a larger community redevelopment plan that covers a number of brownfields that are identified for cleanup in a step-by-step process that considers economic, environmental and social equity factors. The Green Tier contract also reaches into nearby neighborhoods and small, minority-owned businesses that supply the larger brownfield manufacturers. The contract involves local, state and federal agencies, community advocates, lenders, insurers, NGO service providers, other business interests and prospective employers. The Green Tier contract provides the legal mechanism to implement a "bigger bubble" that covers an industrial valley that once employed 50,000 and is hoping for a comeback. Contract provisions include jobs, community health, cleanup standards, an air-bubble that allows trading for job growth, multiple-agency regulatory flexibility, stormwater runoff management and public infrastructure such as streets, lighting, recreational facilities and community center, and has a mix of public and private sponsors and funding sources managed through a cooperative that's 501(c)(3) qualified. (14)

Example: Green Tier Contract for a forest products sector:

A forest products sector with an historic environmental footprint but can point to recent environmental accomplishments develops a sector EMS to enhance its collective performance, distinguish itself in the global marketplace and respond to regulators. The trade association managing the sector's contract provides a long term approach to managing forestland, developing alternative fiber sources, energy efficiency, product stewardship, chemical use reduction, climate change strategy and water conservation. Regulators provide stepped self-regulation authority

applying the "bigger bubble" concept to the sector with performance assurances and a contract mileposts that are sensitive to capital equipment costs, market conditions and economic cycles.

As illustrated, Green Tier contracts fit production lines, facilities, firms, geographic areas, supply chains, business sectors, products and pollutants or unregulated problems. As legal instruments, they implement the "bigger bubble" that allows trading among various types of risk reduction.

Also illustrated is the fact that Green Tier contracts may involve not only the government, but many other parties. They apply to permitted facilities, unregulated and independent organizations. For the time of the contract, they bring individuals and organizations together for environmental improvement, regulatory relief, community sustainability or all three.

Green Tier's Legal Accountability

Although participation in the Green Tier is voluntary it should not be confused with voluntary compliance with either the specific emissions standards set in law or the performance aspects of the contracts. The contracts are legitimate, specific, legal and enforceable.

The research and negotiations that took place in connection with the EPA-Wisconsin agreement provided great clarity and certitude for all parties in regard to the question as to whether the contractual/agreement approach compromised enforcement authority. The answer was, "No". State authority was not compromised, according to Democratic Atty. Gen. James Doyle, who offered his legal opinion on Republican Gov. Thompson's initiative. The reaffirmation of the regulatory authority was eloquently articulated in the National Environmental Enforcement Journal by Asst. Atty. Gen. JoAnne F. Kloppenburg. (15)

Kloppenburg also affirms the administrative significance of the agreement within the context of the federal system with the following conclusion:

"This agreement is significant because it is the first agreement EPA has signed with a state providing for regulatory innovation. The agreement is significant also because it commits EPA to a role of support, through timely input and consultation, not of oversight, and because it assures participating facilities that the benefits conferred by participation will be honored at the federal level as well as the state level."

The Green Tier concept builds on the pilot law with regard to legal affirmation of the performance contract's standing and the opportunity for negotiated mutual-gain understandings involving the business, government and non-government communities. (16)

The contract could provide all parties a degree of protection.

Green Tier's Environmental Management Systems

A credible environmental management system (EMS) generally is required for participation in the Green Tier. An EMS provides discipline and reporting processes that reassure regulator, public and firm that a high level performance is likely to be achieved, maintained and improved upon. Similarly, the management systems approach delivers value to the firm through risk reduction, cost containment and, potentially, favor from the financial sector and consumers.

An acceptable EMS for Green Tier participants is in the Wisconsin Cooperative Environmental Agreement law, which makes reference to ISO 14001 as one system but invites other systems, including those applicable to a facility, firm or sector. The law requires compliance and public reporting that are similar to Europe's EMAS system to compensate for ISO 14001's shortcomings.

Some states and EPA personnel have raised concerns about the ISO 14001 system in two respects:

1. Unclear language regarding obeying environmental laws, reporting to citizens and pollution prevention;
2. The qualifications and integrity of registrars and their self-policing system.

Regarding the standard's language, the MSWG has appropriately challenged ISO 14001 authorities to correct several defects that already are getting the standard bad press.

ISO's requirement that the registered party "commit to compliance" rather than "obey the law" puts it on a collision course with regulatory relief initiatives. Further, with increasing fervor, the more aggressive public interest community is attacking ISO 14001 for its poor compliance language and lax public reporting standards. (17)

States like Wisconsin are working to correct ISO 14001's flaws and unless they are corrected are unlikely to include the basic ISO 14001 in their regulatory reform plans. Wisconsin's and Oregon's approaches to ISO 14001 are similar and may show the way for other states.

The more serious concern relates to the competency and integrity of the registrar system, globally and within the United States. Quiet reports surfaced at the 1998 international meeting of ISO's TC 207, the governing body overseeing ISO 14000. Now the concerns are heightened following environmentalists' attack on ISO 14001 because of a questionable registration on the east coast. Questions exist about the registration of firms facing enforcement actions, firms that are registered even though they refuse to share their compliance records with registrars and firms that get registered to ISO 14001 simply by saying their goal is to get registered. These are serious issues that need exposure and debate so regulators, the public and the registrar profession itself can judge the quality and integrity of ISO 14001's self governing system. When the word spreads about these concerns, I am confident that states and public interest community will seek the facts. The Registrar Accreditation Board should take note.

Even with ISO 14001's problems, there is great value in an EMS and the Green Tier reflects that view. Designed and validated properly, the EMS delivers due diligence legal value, giving the firm added protection against lawsuits. A credible system also delivers value to the company if it meets supplier requirements, has standing in world commerce and complements other systems such as ISO 9000, OSHA or/and HACCP. A credible system also plans for, provides for and expects continuous improvement, which is an important advantage over a more static command and control regulatory system.

Green Tier's Performance Incentives

The overarching principle guiding the Green Tier is that initiative and success in the public interest should be rewarded. Firms and others that consistently meet the statutory environmental standards and produce greater than required environmental results should get favored treatment. It follows, they also should get favored treatment to produce greater benefits for the businesses, for the environment and for society as a whole in a mutual-gain and continuously improving system.

For example, Green Tier firms would earn rewards by mentoring others toward greater environmental performance or by performing significant, voluntary, services that attack "unregulated aspects". The rewards may include regulatory relief, an approach being codified in Oregon's Green Permit program.

Wisconsin is using the impressive work of Paul Burnet, Oregon Department of Environmental Quality, who, with EPA Office of Reinvention support, studied incentives as an Atlantic Fellow in Public Policy at the University of East Anglia in the United Kingdom. Burnet's incentives include a menu of regulatory relief, direct financial tool such as tax credits and indirect financial tools such as procurement, leasing and construction policies.(18)

In his comprehensive paper, Burnet wisely said attention to unregulated aspects should be eligible as incentive generators, but only after compliance with standards was in hand. He also recommended that legislation promoting flexibility and offering incentives should be enabling rather than directive. Such flexibility invites experimentation and targeted use of incentives, he said, as well as facilitates the changes in culture required to move into what Prof. Larry Susskind of MIT calls a "mutual-gain" environmental agreement process. (19).

In simple terms, mutual-gain in Green Tier contracts means regulatory relief will be granted to businesses, the only question is how much, how fast, with what assurances of an environmental safety net. As is provided for in Wisconsin's pilot project law and reaffirmed

in the EPA agreement, regulations, policies and guidance are on the table with regard to their application to the pilot project or contract. The challenge for the parties to the contract, including public interest parties if they are there, will be to pull, piece by piece, those elements of the regulatory permit that produce little value other than their ability to put a price-tag on the cost of distrust. This process involves more than technical judgments because paperwork requirements have, over time, represented the real or imagined environmental safety net for regulator and public and thus should be pursued with care and sensitivity to all parties and with the public interest in constant focus.

Wisconsin's Green Tier differs from Oregon's Green Permits in that Oregon is focused on a facility's permits and provides for three tiers of performance. Wisconsin's effort is broader, with an expectation that parties can and will negotiate a wide variety of performance issues in the contracts, including elements of the other two spheres of the ecosystem in addition to the environmental one. Those spheres relate to the economy and issues such as jobs and profits and community with issues such as health, education and safety.

The Green Tier uses an environmental performance contract as its primary tool. While contracts are not familiar to most government regulators and government attorneys, they are legal tools familiar to business, which should make it attractive to businesses and their lawyers.

The contract is attractive because it can encompass and adapt to multiple parties, interests, contingencies, conditions, considerations and sanctions. It also may cover a long or short period of time and have performance mileposts at mileposts agreed to by the regulators, businesses or citizens. It is a useful instrument for a mutual-gain process that produces measurable results in a system of shared responsibility and clear accountability.

Continuous EMS Performance Improvement

The regulatory system is criticized for failing to encourage innovation and continuous performance improvement. But even if it did, there is no consequential infrastructure to support the sharing of innovations, best practices, problem solving, performance information and case studies, which are standard building blocks of a solid performance system.

The challenge is to put environmental performance on the government activity map and so MSWG is laying the conceptual groundwork for an ecological performance improvement system and center (EPIC) to serve business, government and public interest communities interested in achieving greater than the minimum (compliance) good for the public interest. The system will use data from a growing list of EMS pilot projects commissioned by MSWG and EPA and eventually from other business sectors and international sources such as the European Union. So far, about 90 projects are contributing data to the University of North Carolina-Chapel Hill database funded by the EPA Office of Water and co-managed by the Environmental Law Institute.

The center, system and MSWG research strategy are anchored in the expertise and credibility of the university community but connected to the "reality" through a closed-loop system that solicits, processes and distributes concrete EMS performance information businesses, government and public interest communities to be used in their decision processes and operations, (Fig. 3)

As envisioned, EPIC will receive, synthesize and place performance information from protocol-compliant and quality-assured pilot projects using EMSs and other conforming EMS data sources. This will provide a structured framework for data collection and performance management, critical elements in a continuous quality improvement process. These data and the in-depth, qualitative research that follows should fuel a national continuous quality improvement system for the environment that mimics this nation's commitment to a century

of enhanced agricultural productivity through research, teaching and outreach.

MSWG's research strategy began by soliciting researchers' advice through academic roundtables at Stanford, Northwestern, UNC-Chapel Hill, Harvard, Yale and Carnegie Mellon. The academics' questions contributed to the planning for the November 2-3, 1999 national EMS research summit in Washington. The summit will address the relationship of EMSs to environmental, business and social performance and propose a recommended information infrastructure to facilitate research and advocate networking and best practice sharing. MSWG is seeking financial support for the event and the follow-up activities which will involve sharing the report and implementing the recommendations. (20)

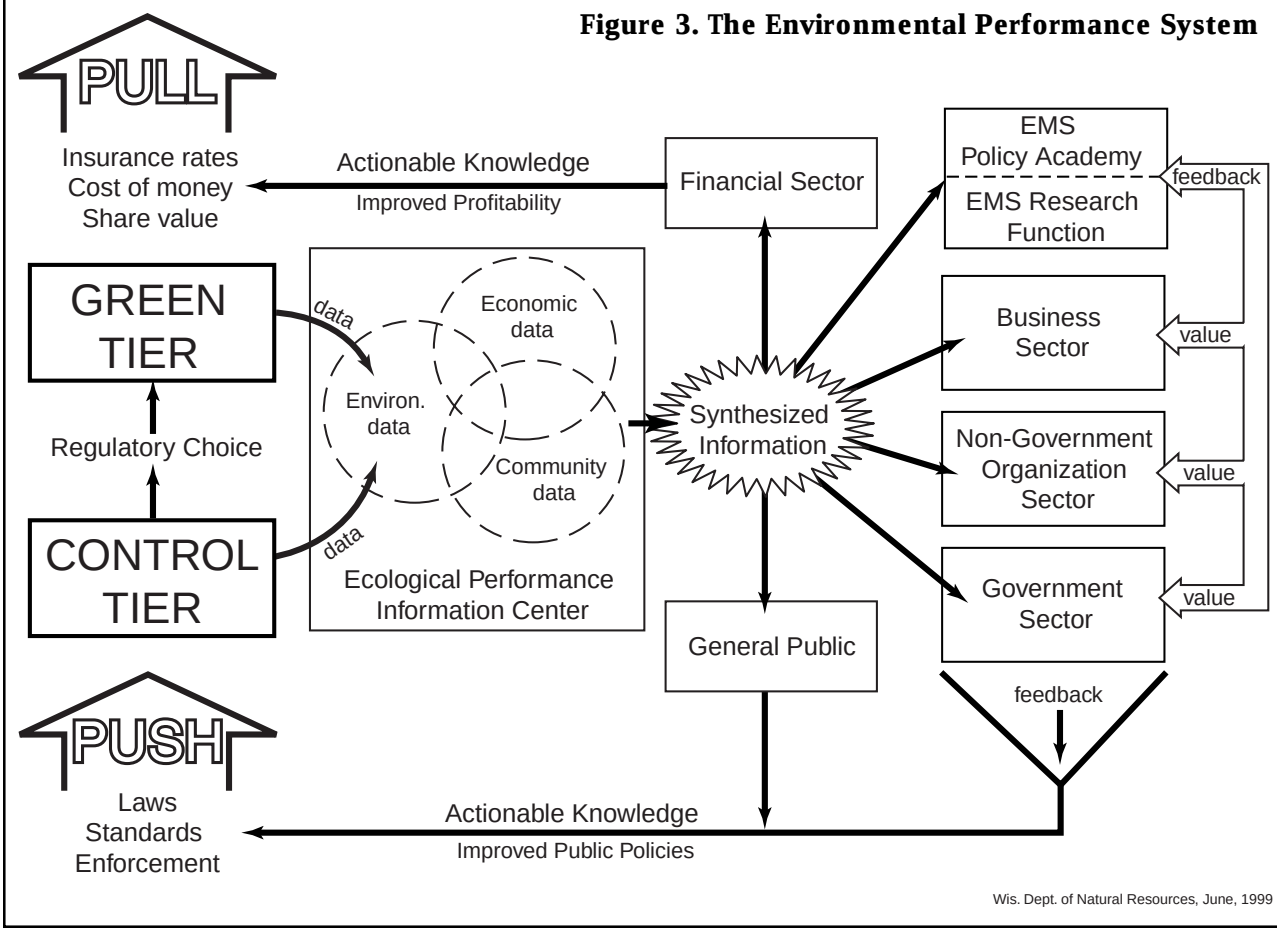
Another need facing states that are innovating through the use of EMSs is the problem of securing the in-house expertise to develop and implement EMS agreements as part of an effective, continuously improving performance system. The concept of an EMS policy academy is being proposed by The Council of State Governments and MSWG and it is hoped that the academy concept, which has received enthusiastic response from business and public interest representatives on MSWG, will gain national and international support.

The academy would have three functions under the CSG-MSWG plan:

1. To train and provide technical assistance in the use of EMSs to achieve public policy goals;
2. To convene state and other interested parties to discuss the effective use of EMSs and identification of EMS research issues;
3. To provide support services to the states and others considering or using EMSs to achieve public policy goals.

It is intended that business, government and public interest sectors would participate in the training and learning processes, using case studies and synthesized information from EPIC. Also, the academy will serve interna-

Figure 3. The Environmental Performance System



tional trainees. CSG will tap EMS talent in all three sectors as cadre for the academy to provide training, develop materials and provide technical assistance.

Wisconsin is enthused about the potential of a national ecological performance system and training infrastructure and will do its part to produce the information needed and provide the support that's appropriate for their development and functioning.

We also realize that the businesses from the both Control Tier and Regulatory Tier that will be submitting the EMS data to the center will be performing a great public service. As such, it is appropriate to consider paying for their inconvenience and costs, a consideration recognized in Paul Burnet's paper.

Consistent with continuously improving system principles, the information will be used to improve decision processes and performance of each sector. However, the processes of soliciting, processing and evaluating the data also will provide an excellent opportunity for the three sectors to move beyond the distrust and animosity that characterize participation in the Control Tier.

The data collection and collaboration system envisioned by MSWG would fill a need for constant and well organized attention to the regulatory innovations in the states and elsewhere. Organizations such as ECOS or professional groups serving air, water or waste control professions could plan programs on regulatory innovations using EPIC data and case studies flowing from it.

Through the EPIC and CSG functions envisioned by MSWG, the experiences of states like Massachusetts, New Jersey, Oregon, Arizona, California, Florida and Pennsylvania that are experimenting with consolidated permitting, information regulation, performance management, accelerated permitting, covenants and tiers could be collected and organized.

Similarly, businesses and public interest groups, for different reasons, have reason to experiment and their lessons are important, should be captured and then shared in cross-sector networking. One business group is the American Electroplaters and Surface Finishers Society. An environmental group is the Environmental Defense Fund. In addition, there are hundreds of local experiments in permitting and performance agreements that need to be identified, evaluated, processed and made available and promoted in a coordination fashion. EPIC and CSG would be interested in those as well.

The Financial Sector's Role

In addition to the government-authorized incentives for performance achieved in the Green Tier, there also is the issue of whether the private sector has incentives available to it to encourage results that address certain social or environmental needs of society while maintaining profitability. The challenge of finding performance metrics that have meaning in an economic as well as social (including environmental) sense is real and is meriting the attention of accounting groups and voluntary organizations such as CERES, the Coalition for Environmentally Responsible Economies.

Theoretically, businesses that have EMSs will do a better of conducting business in all of its aspects, not just the environment. Such conduct should produce lower risks, less liability and enhanced profitability over time. The challenge is to conduct the research that makes the link and translates it into formulas and decision process recommendations, including the basic recommendations such as "buy" and "sell." The search for "financial ecometrics" is not the financial sector's alone, however. The states, as I argued in 1997, have a role to play as well and could be of great information-partners, providing data and advice to the financial sector. (21)

The Green Tier proposal fits well with the pilot project concept of the MSWG and EPA and is capable of providing the opportunity for the generation of data that are important to all parties in the financial sector. Insurers will be able to learn about risk exposure over time; lenders will be able to better understand business efficiency and brokers will be able to understand the relation between total performance and consumer confidence in a firm. Insights in many cases will involve a mix of quantitative and qualitative data, but for the first time ever, there is a real opportunity for

creation of a framework to generate, process and share information of value to the financial sector in its decision processes.

When more states like Wisconsin adopt the Green Tier, they will have the capacity, as well trade groups and other qualified parties, to push data into EPIC where it will be processed to meet the needs of numerous stakeholders, the financial sector included. In the MSWG model, the financial sector and financial news media such as The Financial Times and The Wall Street Journal will grow into demanding and articulate data consumers as they better understand the value of the information in their own risk, investments and lending decisions.

Guideposts for New Laws

Whatever evolves from Congress and the states is likely to be framed by a number of guideposts constant in many regulatory reinvention discussions. The guideposts are not only useful in measuring the technical credibility of the initiative, but in evaluating its chances of passage in state and national legislative processes.

These important guideposts apply to the Green Tier and federal "next generation" legislation. For greatest credibility, the new laws must do the following:

1. Honor and exceed existing and future statutory standards for health, safety and the environment and allow them to be efficiently met;
2. Promote attention to unregulated environmental needs;
3. Promote continuous improvement of performance to benchmarks of beyond compliance;
4. Permit the balancing of environmental, economic and community needs over a reasonable period of time;
5. Report performance information to the public that is accurate, timely, credible, relevant and useable to interested parties.

The guideposts are interconnected. For example, it is possible to use the Green Tier approach to meet the requirements and needs of multiple regulatory or business systems. Firms adopt systems such as ISO 9000, QS 9000 and (the chemical sector's) Responsible Care to meet business needs. But systems also may be tools in validating a firm's social viability and accountability in environmental, worker and human rights categories. Adoption of ISO 14001, SA 8000 and sector-driven accountability programs is increasingly attractive as a means to forestall criticism from consumers, regulators, stakeholders and shareholder activists. The Green Tier emphasis on contacts and systems approaches adapts to businesses that want to demonstrate their responsibility in the world community and reliability in the marketplace.

The private sector already is developing voluntary reporting measures such as the Global Reporting Initiative of CERES and the sustainable business indicators of the World Business Council for Sustainable Development. The Green Tier is well suited to accommodate those efforts, too. It may be that those voluntary efforts would have sufficient standing with the public and regulators so as to qualify for a degree of delegated self regulation, saving the businesses money and producing greater social and environmental value possible thorough the Control Tier approach.

Many regulators are unaware of the these voluntary reporting initiatives or view them skeptically. Voluntary performance agreements and self-reporting are opportunities, not threats, as many states have found in their dealings with European countries such as The Netherlands and Bavaria, both of which are more advanced than the United States in using voluntary, cooperative approaches to achieve environmental results.

Recommendations

Wisconsin's Green Tier and emerging innovations in other states are positive signs of restless creativity to find a better ways to protect the environment. Simultaneously, there's is a sense that some forces in each of the sectors inside the Beltway don't want innovation unless it is on their terms. This is producing anxiety and anger outside the Beltway among individuals who believe the reform stalemate will only heighten pressure for backsliding.

Perhaps the resistance to change is one of the reasons the courts are less likely to favor EPA's aggressive use of the law and find disfavor with class action environmental suits.

It took about two years for Wisconsin's innovative law to get EPA approval. That's too long, especially considering that EPA had input on the bill even before it was drafted and an opportunity to comment during the legislative process. The delay is even more perplexing when, as stated by Asst. Atty. General Kloppenburg, the legislation was an alternative to an audit privilege and immunity bill that EPA and DNR opposed. The National Academy of Public Administration is studying the Wisconsin process as a part of a Congressionally-directed review of how the EPA and states resist, facilitate or accommodate change.

Whatever the explanation, it is clear the states and others qualified to test new and possibly better ways cannot be expected to succeed without at least five significant decisions to support their aspirations:

1. Congress must protect the innovators.

There is no clear federal direction or authority for environmental innovation and there is no protection and little financial support for the innovators. This has hindered EPA programs such as Project X-L and the Common Sense Initiative and been an even more significant barrier to states which are caught in an incredibly complex and frustrating EPA approval process that includes rules, policies, guidance and even personal opinions of an EPA overseer. These factors weigh in heavily as states petition for even minor deviations in the way things are done.

Title II of the bi-partisan legislation must permit and protect those states and others that are qualified to experiment. The states, further, need clearly delegated authority for innovation as co-innovators in a new co-equal relationship with EPA.

There is much support for giving states greater latitude in experimentation. The National Academy of Public Administration calls for "accountable devolution" and contrasts the states' efforts to "broaden the base for re-invention" with EPA innovations that operate at the margins. Businesses involved in the Enterprise for the Environment say "states should be given the latitude to implement and manage a broad range of creative environmental strategies".

2. Build an information infrastructure.

Congress and environmentalists tell EPA that when it records more environmental failures things are improving. That makes as much sense as finding economic encouragement in more bankruptcies. EPA's information and enforcement infrastructure has made it difficult for the agency to both define and measure success. The Control Tier needs to have data to do its work. It's equally true that the Green Tier needs a new information infrastructure that captures stories as well as data to fuel a continuously improving system.

Title I of the bi-partisan legislation will focus on setting priorities, identifying metrics and measuring performance. That may not directly help states and businesses in EMS pilot projects but it's a start. States, businesses and public interest groups must have a place with the capacity to collect, synthesize and distribute information on environmental successes and grass roots experiments just as well as the Office of Enforcement and Compliance Assurance shares failure information. That place is the Ecological Performance Information Center (EPIC) which produces EMS performance information that helps businesses, governments and public interest groups meet their needs. The product of the MSWG-Brookings Institution EMS research summit November 2-3, 1999 should be considered by the EPA, US Congress, businesses and foundation funders as an opportunity to create a new, positive performance information system.

3. Create an EMS policy infrastructure.

States will be places where innovation involving environmental management systems begins and where EMSs are first applied as part of the next generation of environmental law. Training of state employees and others who will be involved in these EMSs has been limited and scattered. There is a need to reach out to non-environmental state agencies (such as business, health and agriculture), businesses and public interest communities to

insure they have the tools needed to fully participate in the Green Tier and similar EMS-related innovations that will be incorporated into public policies and programs.

The Council of State Governments-Multi-State Working Group EMS Policy Academy fulfills all of those needs and more. As proposed, it is a model of innovation. It is a public-private partnership; its focus is on results; it reaches over the artificial boundaries that separate the sectors of society and jurisdictions of government; and it appreciates that America's states link with nations and states overseas, as Wisconsin is demonstrating in its Bavarian-Wisconsin Regulatory Reform Working Partnership. The EMS Policy Academy is an innovation whose time has come; it deserves funding from foundations and others as soon as possible to begin operation in 2001. (22)

4. Establish a financial eco-metric system.

More powerful than the regulatory "push" initiatives is the power of the marketplace to produce performance incentives. The performance model advocated by Wisconsin correctly identifies the power and the position of the financial sector and its insurance, lending and brokering functions.

The financial sector and its supporting professions, such as accounting, auditing and financial press, should be full partners in the collection, evaluation and dissemination of performance metrics envisioned through the ecological performance information center and the many pilot projects and others that will feed it data. The sector then should endeavor to interpret that information and contract for new information and research, using the states as eco-metric labs, to determine the nature of the link between risk reducing and long-term profit enhancing environmental management systems.

Landmark studies by the World Resources Institute and others have documented the need for new ways of thinking about risk and exposure of a corporation's good name. Awareness to exposure should be especially acute after the experiences of Shell and Nike. Using data generated by domestic and global experiments, institutions such as the World Bank and United Nations should encourage the financial sector and business schools to use EPIC and similar data gathering processes to provide insight and direction on how to evaluate the costs and benefits of responsible behavior over time.

5. Create places and processes for civil discourse.

The distrust that characterized the command and control era has exacted a price on the nation's environment in terms of lost opportunities and incomplete assignments. It also has taken a toll on our national presence of mind over 30 years. That need not be the case with the Green Tier and other collaborative innovations.

States with pilot projects and innovation proposals should use each project and each proposal as an opportunity to bring people from different sectors together to talk about common issues and mutual opportunities. They should talk about how they can work together to make a bigger pie and to produce mutual gain. The first uncomfortable ventures may not produce immediate success but are a necessary beginning for the civil environmental society which must exist for a successful and perhaps even survivable 21st century. The First Generation of environmental law has produced good environmental results but it also has produced an environmentally dysfunctional family in America, a problem that needs multi-sector attention in the Second Generation for the good of the nation.

Conclusion

Barriers to environmental innovation and systems thinking are considerable, especially in the regulatory sector and among its supporters. There remain in the regulated sector those who would choose to backslide, and although they are relatively few in number, vigilance is appropriate. However, through carefully and collaboratively developed experiments, state-initiated innovations and considerable transparency, progress is possible.

An important principle going into the change process is to remember that "the perfect is the enemy of the good." No proposal and certainly no untested proposal, is perfect.

But the proposal may be good and it may be better than the status quo. So it makes sense to see what is not happening or what is not happening well with the status quo. What's its cost? If that calculation is done honestly and accurately, more often than not, it's safe to speculate that reasonable people will conclude it makes sense to, "Just do it", to take the chance at finding something better, a choice that has distinguished this nation since its founding. That is what the creators of the Control Tier did a generation and a half ago. Looking back, a great deal was accomplished. I believe that innovators in our time will make the same claim a generation and a half from today.

End Notes

(1) Beinart, Peter, "The Pride of the Cities: The new breed of Progressive mayors", The New Republic, June 30, 1997.

(2) New Progressive principles are the foundation of two-tier regulatory system. Transcending Progressive principles hold that the environmental commons should be protected. Consistent with New Progressivism, the means to that end varies from the old way. Old Progressivism held that citizens were incapable of dealing with complex, public issues and government should hire and protect professional employees to administer government for the people. Some New Progressives contend government has become a special interest and citizens must have greater capacity to decide their own fate. The two-tier approach allows citizens, businesses and government employees to environmentally achieve together what none can achieve alone.

(3) Knopman, Debra S. and Fleschner, Emily, "Second Generation of Environmental Stewardship: Improve Environmental Results and Broaden Civic Engagement", The Progressive Policy Institute, May, 1999, Washington, DC

(4) New York Times, "Novel Antipollution Tool is being Upset by Courts", June 5, 1999

(5) The MSWG is an ad hoc group of government, business, public interest and academic parties interested in evaluating and advocating environmental management systems. More information can be found on its web site in Pennsylvania: www.dep.state.pa.us/dep/deputate/pollprev/Tech_Assistance/mswg.htm

(6) Howes, Jonathan; John, DeWitt, and Minard, Rick, "Resolving the Paradox of Environmental Protection: EPA's central challenge is to maintain rigorous national standards while providing the utmost flexibility to states, communities and companies"; Issues in Science and Technology, Summer, 1998

(7) Wisconsin's Cooperative Environmental Agreement law is on the web at: www.dnr.state.wi.us/org/caer/cea/ecpp/bill100.htm

(8) The EPA-Wisconsin Innovation agreement is on the web at: www.dnr.state.wi.us/org/caer/cea/ecpp/epa/epa_moa.htm

(9) The Green Tier proposal is on the web site of the Wisconsin Department of Natural Resources' Bureau of Cooperative Environmental Assistance at the following address:

http://www.dnr.state.wi.us/org/caer/cea/reinvention/green_tier/green_tier.htm

(10) For information on the Oregon Green Permit program contact Marianne Fitzgerald, Department of Environmental Quality, 811SW 6th Avenue, Portland, OR 97204-1334; ph. 503-229-5946.

(11) Organizations dedicated to business ethics, such as Business for Social Responsibility and Coalition of Environmentally Responsible Societies and industry improvement, such as the Chemical Manufacturers Association and its Responsible Care program, may have value in helping set performance thresholds, according to Prof. Shelley Metzenbaum of the University of Maryland in "Making Measurement Matter: The Challenge and Promise of Building a Performance-Focused Environmental Protection System", The Brookings Institution's Center for Public Management, October 1998

(12) The Multi-State Working Group on Environmental Management Systems is focusing on

use of EMSs in enforcement settings; see "MSWG Takes on Compliance Issues with ISO 14001: US, European Experts discuss EMS Enforcement Possibilities", International Environmental Systems Update, March, 1999. And Wilson, Cheryl L. and Thomas, William L., "Understanding the Value of a Corporate-Wide EMS for Regulators and Strategies Alike", Corporate Environmental Strategy, Summer, 1998.

(13) A supply chain EMS with an auto firm is authorized as a part of the Wisconsin pilot law and anticipated in the Regulatory Reform Working Partnership between the Free State of Bavaria and the State of Wisconsin. Information can be found on the web at: www.dnr.state.wi.us/caer/cea/projects/bavaria/partnerships.htm

(14) The "bigger bubble" has been articulately described by E. Donald Elliot, former general counsel of EPA and Gail Charnley, former executive director of the Presidential/Congressional Commission on Risk Assessment and Risk Management whose ideas are reflected in the Green Tier concept. Their article: "Toward Bigger Bubbles: Why interpollutant and interrisk trading are good ideas and how we get there from here", Forum for Applied Research and Public Policy, Winter, 1998.

(15) Kloppenburg, JoAnne F., assistant attorney general, State of Wisconsin, "A Regulatory Innovation First: Wisconsin Department of Natural Resources' Environmental Cooperation Pilot Program", National Environmental Enforcement Journal, May, 1999.

(16) Public interest groups negotiating contracts also have "consideration" to offer. In 1997, NGOs leveraged Royal Dutch Shell regarding environmental, ethical and human rights issues. Shell delivered on the "contract", but so NGOs. NGOs offered candid but generally supportive comments in Shell's 1999 report on "People, Planet and Profits: An act of commitment". In The Financial Times of 14 July 98, Green Peace commented regarding Shell's performance, especially in regard openness and transparency.

(17) MSWG's positions on ISO 14001 are found on the web at www.dnr.state.wi.us/org/caer/cea/iso/iso/_speeches.htm and at www.dnr.state.wi.us/org/caer/cea/iso/ecpp/ecpp.htm

(18) Burnet, Paul, "Improving Environmental Regulation: The Use of Incentives", Center for Social and Economic Research on the Global Environment, University of East Anglia, Norwich, England, UK, November, 10, 1998.

(19) Prof. Larry Susskind, Massachusetts Institute of Technology, has advised environmental officials in The Netherlands on their covenant system to negotiated environmental agreements involving business, government and public interest groups and now works on cultural change in its regulatory sector. His book, "Negotiating Environmental Agreements" is being published by Island Press.

(20) MSWG's research strategy and findings from the academic roundtables are posted on the MSWG web site.

(21) Meyer, George E., "Adam Smith, the States and the Financial Eco-Metric Imperative", Environmental Quality Management, Winter, 1997. Article at: www.dnr.state.wi.us/org/caer/cea/reinvention/green_tier/article.htm

(22) For information on the Council of State Governments Multi-State Working Group Environmental Management System Policy Academy contact Barry Tonning, CSG, at 606-244-8228 or btonning@csg.org

Wisconsin's Green Tier Regulatory Proposal

Vision: *Business achieves greater environmental and economic performance through a cost-saving, voluntary regulatory system.*

What's the problem?

Government, business and non-government parties may resist change, even knowing the regulatory system may have reached the limit of its effectiveness and all could benefit from more adaptive approaches.

What is the Green Tier System?

It is a performance contract system to complement command and control regulations. The contract adapts to the needs of the firm, community and environment.

How would it work?

It's voluntary. Firms and the government negotiate contracts that are flexible, innovative, efficient and enforceable. An environmental management system in the contract provides assurance of compliance, predictable performance and due diligence. Self auditing, policing and reporting may be approved under "mixed liability" accountability.

What's in it for business?

Save time, reduce costs; encourage innovation; contain liability; adapt to market or supply chain demands; "trade" emissions within a "bubble"; incentives to prevent pollution first, and added credibility with citizens and customers.

What's in it for taxpayers?

Reduces bureaucracy. Allows regulators to set standards and focus on more pressing problems and sub-performing regulated organizations. Some duties are "deputized".

What's in it for the community?

More communication, involvement and a cleaner environment.

What's in it for the environment?

Produces greater environmental results by helping businesses and others do more than the minimum. Contracts may fit production lines, facilities, firms, areas, supply chains, sectors, products or pollutants and unregulated problems, like land use, mobile air pollution sources and runoff.

How did the idea evolve?

Green Tier is a blend of ideas from: Ireland, Germany, The Netherlands, Indonesia, European Union, New Jersey, Oregon, California, Illinois and Massachusetts and reform studies.

What happens to command and control?

It's there if you want it or don't qualify for Green Tier.

Contact: George Meyer, WIDNR, Box 7921, Madison WI 53707

Further Information from The Web

Wisconsin regulatory innovation pilot project law

www.dnr.state.wi.us/org/caer/cea/ecpp/bill100.htm

Wisconsin Cooperative Environmental Agreement program

www.dnr.state.wi.us/org/caer/cea/ecpp/ecpp.htm

Wisconsin-EPA innovation agreement

www.dnr.state.wi.us/org/caer/cea/ecpp/epa/epa_moa.htm

Wisconsin Green Tier proposal

www.dnr.state.wi.us/org/caer/cea/reinvention/green_tier/green_tier.htm

www.dnr.state.wi.us/org/caer/cea/reinvention/reinvention.htm

Wisconsin-Bavaria Regulatory Reform Working partnership

www.dnr.state.wi.us/org/caer/cea/projects/bavaria/partnership.htm

Multi-State Working Group on Environmental Management System

www.dep.state.pa.us/dep/deputate/pollprev/Tech_Assistance/mswg.htm

MSWG Pilot projects

www.eli.org/isopilots.htm

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